Zamzam Arabic Food Holding Sdn Bhd & Anor v Johanjana Corp Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02 (IM) (NCC)-1649–11 OF 2020
KAMALUDIN MD SAID, HADHARIAH SYED ISMAIL AND GUNALAN MUNIANDY JJCA
4 APRIL 2022

Companies and Corporations — Fraudulent trading — Elements of offence — Whether 'person' in s 540(1) of Companies Act 2016 ('the CA') referred to a natural person and did not include a corporation notwithstanding definition of the word 'person' in s 3 of Interpretation Acts 1948 and 1967 — Whether purpose of s 540(1) was to impose personal responsibility and liability on director or person in control of company, and not the company itself, for carrying on business of company with intent to defraud creditors — Whether importing meaning of 'person' in s 3 of Interpretation Acts into s 540(1) would render it meaningless as only a real person could have an intention to defraud — Companies Act 2016 s 540

The first defendant ('D1') in the High Court proceedings in this matter had entered into tenancy agreements with the plaintiff (the respondent herein) to rent seven premises to operate a restaurant and banquet hall known as 'Restoran ZamZam'. When D1 defaulted under the tenancy agreements, the plaintiff sued and obtained judgment against D1 for arrears of rental, vacant possession and damages after which it wound up D1 when the latter failed to settle the judgment debt. Prior to the winding up, D1 had vacated the plaintiff's premises and moved its business to another location where Restoran ZamZam was taken over and run by the second defendant whose director and shareholder was the tenth defendant (respectively, the first and second appellants herein). The plaintiff thereafter sued all the 11 defendants in the High Court pursuant to s 540 of the Companies Act 2016 ('the CA') contending that they had fraudulently colluded/conspired to allow D1 to escape paying its judgment debt to the plaintiff by having the assets and business operations of D1 transferred to other entities in the ZamZam group of companies which consisted of the first, second, third and fourth defendant companies (the fifth to the 11th defendants were the directors, officers and shareholders of those companies). The plaintiff sought an order that the second to the 11th defendants be held personally responsible without limitation of liability to jointly and severally settle D1's judgment debt to the plaintiff which at that time stood at RM1,872,966.49. The appellants herein, who were, respectively, the second and the tenth defendants in the High Court, applied to strike out the plaintiff's (respondent's) writ of summons and statement of claim under O 18 r 19 of the Rules of Court 2012 on the ground that it did not

A disclose a reasonable cause of action against them and was an abuse of process of court. The first appellant's grounds were that: (a) it was a company and did not fall within the definition of 'person' in s 540(1) of the CA; and (b) it never had any contractual dealings with the plaintiff and D1's failure to settle its judgment debt had nothing to do with the first appellant. The second B appellant's grounds were, inter alia, that he was wrongly made a party to the action as he had nothing to do with D1 or the plaintiff either personally or as the director of the first appellant. The High Court dismissed the striking-out applications on the grounds that: (i) the plaintiff's claims against the appellants were not obviously unsustainable as the statement of claim had pleaded C sufficient particulars of fraud or fraudulent trading against them; (ii) based on the definition of 'person' in s 3 of the Interpretation Acts 1948 and 1967, the word 'person' in s 540(1) of the CA would include a corporation; and (iii) a joint reading of s 540(1) with s 540(3) and (4) of the CA enabled a company or D individual who was involved in the activity or receipt of proceeds of fraudulent trading to be named as a defendant.

Held, unanimously allowing the appeal, setting aside the decision of the High Court and striking out the respondent's writ and statement of claim against the E appellants:

(1) Section 3 of the Interpretation Acts could not be read into s 540(1) of the CA as it would give effect to inconsistent meanings to s 540(1). The underlying purpose of s 540(1) was to impose a personal responsibility F and liability on the director and/or the person who controlled the company, and not the company itself, for carrying on the business of the company with intent to defraud a creditor. The wording in s 540(1) was plain and unambiguous. The word 'person' in s 540(1) in its ordinary and natural meaning meant 'a real person'. He could be a director, managing G director or person in control of the company. Therefore, to give effect to s 540(1), the court had to apply the ordinary meaning of 'person' and not the meaning assigned to it by the plaintiff/respondent (see para 27).

(2) To accede to the respondent's contention would render s 540(1) meaningless because s 540(1) had penal consequences. Only a real person H could have an intention to defraud a creditor. Such an intention did not exist in a company. For example, the act of buying goods with knowledge or intention of not paying for them because the company had no funds could only be made by a director of the company who carried on business in that manner. A company did not have a mind to cheat. The High I Court erred in accepting the respondent's contention that the word 'person' in s 540(1) included a company when it did not. It therefore followed that the respondent/plaintiff did not have a cause of action against the first appellant/second defendant which was a company (see paras 28 & 31).

(3) The second appellant (tenth defendant) was not a director of D1. He was only a director of the first appellant. The second appellant had no involvement at all in D1's business. As such, s 540(1) of the CA was not applicable to an individual who was not a director in a company that carried on business with intent to defraud a creditor. For that reason, the High Court erred in holding that s 540(3) of the CA enabled any person who was not a director in the company used to trade fraudulently to be named as a party in a s 540 suit. Section 540(3) was not applicable simply because that section applied only after the court found the elements in s 540(1) had been satisfied, which was not the case here. Accordingly, the respondent had no cause of action against the second appellant and he should not have been named as a party in the action (see para 32).

(4) Consequent to this court's finding that the respondent had no cause of action against the appellants, it followed that the respondent's claims against the appellants were plainly unsustainable and must fail. The High Court erred in finding that sufficient particulars of fraudulent trading had been pleaded against the appellants. On the contrary, this court found that there were no particulars of the appellants' involvement in D1's business which purportedly had been carried on with intent to defraud the respondent. Paragraphs 28(k) and (o) of the statement of claim were insufficient to bring a case under s 540(1) of the CA against the appellants (see para 33).

[Bahasa Malaysia summary

Defendan pertama ('D1') dalam prosiding Mahkamah Tinggi dalam perkara ini telah menandatangani perjanjian sewaan dengan plaintif (responden di sini) untuk menyewa tujuh premis untuk mengendalikan restoran dan dewan bankuet yang dikenali sebagai 'Restoran ZamZam'. Apabila D1 ingkar di bawah perjanjian sewaan, plaintif menyaman dan mendapatkan penghakiman terhadap D1 untuk tunggakan sewa, milikan kosong dan ganti rugi yang mana selepas itu ia menggulung D1 apabila pihak kedua gagal menjelaskan hutang penghakiman. Sebelum penggulungan, D1 telah mengosongkan premis plaintif dan memindahkan perniagaannya ke lokasi lain di mana Restoran ZamZam telah diambil alih dan dikendalikan oleh defendan kedua yang pengarah dan pemegang sahamnya adalah defendan ke-sepuluh (masing-masing, perayu pertama dan kedua). Plaintif selepas itu menyaman kesemua 11 defendan di Mahkamah Tinggi menurut s 540 Akta Syarikat 2016 ('AS') dengan alasan bahawa mereka telah secara curang berpakat/bersubahat untuk membenarkan D1 melarikan diri daripada membayar hutang penghakimannya kepada plaintif dengan meminta aset dan operasi perniagaan D1 dipindahkan kepada entiti lain dalam kumpulan syarikat ZamZam yang terdiri daripada syarikat defendan pertama, kedua, ketiga dan keempat (defendan kelima hingga ke-11 adalah pengarah, pegawai dan pemegang saham syarikat tersebut). Plaintif memohon perintah supaya defendan kedua

A hingga ke-11 bertanggungjawab secara peribadi tanpa had liabiliti untuk secara bersama dan berasingan menyelesaikan hutang penghakiman D1 kepada plaintif yang pada masa tersebut berjumlah RM1,872,966.49. Perayu-perayu di sini, yang masing-masing merupakan defendan kedua dan ke-sepuluh di Mahkamah Tinggi, memohon untuk membatalkan writ saman dan
B pernyataan tuntutan plaintif (responden) di bawah O 18 r 19 Kaedah-Kaedah Mahkamah 2012 atas alasan bahawa ia tidak mendedahkan kausa tindakan yang munasabah terhadap mereka dan merupakan penyalahgunaan proses mahkamah. Alasan perayu pertama adalah: (a) ia adalah sebuah syarikat dan tidak termasuk dalam takrifan 'orang' dalam s 540(1) AS; dan (b) ia tidak
C pernah mempunyai sebarang urusan kontrak dengan plaintif dan kegagalan D1 untuk menyelesaikan hutang penghakimannya tidak ada kena mengena dengan perayu pertama. Alasan perayu kedua adalah, antara lain, bahawa beliau telah secara salah menjadi pihak dalam tindakan tersebut kerana beliau tidak ada kena mengena dengan D1 atau plaintif sama ada secara peribadi atau
D sebagai pengarah perayu pertama. Mahkamah Tinggi menolak permohonan pembatalan atas alasan bahawa: (i) tuntutan plaintif terhadap perayu tidak dapat dipertahankan kerana pernyataan tuntutan telah memplidkan butir-butir yang mencukupi mengenai penipuan atau penipuan dagangan terhadap mereka; (ii) berdasarkan definisi 'orang' dalam s 3 Akta Tafsiran 1948
E dan 1967, perkataan 'orang' dalam s 540(1) AS akan termasuk sebuah perbadanan; dan (iii) bacaan bersama s 540(1) dengan s 540(3) dan (4) AS membolehkan syarikat atau individu yang terlibat dalam aktiviti atau penerimaan hasil penipuan dagangan boleh dinamakan sebagai defendan.

F **Diputuskan**, sebulat suara membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi dan membatalkan writ dan pernyataan tuntutan responden terhadap perayu:

(1) Seksyen 3 Akta Tafsiran tidak boleh dibaca ke dalam s 540(1) AS kerana
G ia akan memberi kesan kepada makna yang tidak konsisten kepada s 540(1). Tujuan asas s 540(1) adalah untuk mengenakan tanggungjawab dan liabiliti peribadi kepada pengarah dan/atau orang yang mengawal syarikat, dan bukan syarikat tersebut sendiri, kerana menjalankan perniagaan syarikat dengan niat untuk menipu pemiutang. Perkataan
H dalam s 540(1) adalah jelas dan nyata. Perkataan 'orang' dalam s 540(1) dalam pengertian biasa dan semula jadinya bermaksud 'orang yang sebenar'. Dia boleh menjadi pengarah, pengarah urusan atau orang yang mengawal syarikat. Oleh itu, untuk menguatkuasakan s 540(1), mahkamah terpaksa menggunakan makna biasa 'orang' dan bukannya
I makna yang diberikan kepadanya oleh plaintif/responden (lihat perenggan 27).

(2) Untuk bersetuju dengan penghujahan responden akan menjadikan s 540(1) tidak bermakna kerana s 540(1) mempunyai kesan menghukum. Hanya orang sebenar boleh mempunyai niat untuk

menipu pemiutang. Niat sebegitu tidak wujud dalam sesebuah syarikat. Sebagai contoh, perbuatan membeli barang dengan pengetahuan atau niat untuk tidak membayarnya kerana syarikat tidak mempunyai dana hanya boleh dibuat oleh pengarah syarikat yang menjalankan perniagaan dengan cara tersebut. Sebuah syarikat tidak mempunyai fikiran untuk menipu. Mahkamah Tinggi terkhilaf menerima dakwaan responden bahawa perkataan 'orang' dalam s 540(1) termasuk syarikat sedangkan ia tidak. Oleh itu, responden/plaintif tidak mempunyai kausa tindakan terhadap perayu pertama/defendan kedua adalah sebuah syarikat (lihat perenggan 28 & 31).

(3) Perayu kedua (defendan ke-sepuluh) bukanlah pengarah D1. Beliau hanya pengarah kepada perayu pertama. Perayu kedua tidak terlibat langsung dalam perniagaan D1. Oleh itu, s 540(1) AS tidak terpakai kepada individu yang bukan pengarah dalam syarikat yang menjalankan perniagaan dengan niat untuk menipu pemiutang. Atas sebab itu, Mahkamah Tinggi telah terkhilaf dalam memutuskan bahawa s 540(3) AS membolehkan mana-mana orang yang bukan pengarah dalam syarikat yang pernah berdagang secara penipuan dinamakan sebagai pihak dalam saman s 540. Seksyen 540(3) tidak terpakai hanya kerana seksyen itu hanya terpakai selepas mahkamah mendapati unsur-unsur dalam s 540(1) telah berpuas hati, yang tidak berlaku di sini. Sehubungan itu, responden tidak mempunyai kausa tindakan terhadap perayu kedua dan beliau tidak sepatutnya dinamakan sebagai pihak dalam tindakan tersebut (lihat perenggan 32).

(4) Ekoran daripada dapatan mahkamah ini bahawa responden tidak mempunyai kausa tindakan terhadap perayu, ia berikutan bahawa tuntutan responden terhadap perayu adalah jelas tidak dapat dipertahankan dan harus gagal. Mahkamah Tinggi terkhilaf apabila mendapati bahawa butir-butir yang mencukupi mengenai penipuan dagangan telah diplidkan terhadap perayu. Sebaliknya, mahkamah ini mendapati bahawa tiada butir-butir penglibatan perayu dalam perniagaan D1 yang kononnya telah dijalankan dengan niat untuk menipu responden. Perenggan 28(k) dan (o) pernyataan tuntutan tidak mencukupi untuk membawa kes di bawah s 540(1) AS terhadap perayu (lihat perenggan 33).]

Cases referred to

Chin Chee Keong v Toling Corp (M) Sdn Bhd [2016] 3 MLJ 479, CA (refd)

Dato' Prem Krishna Sahgal v Muniandy a/l Nadasan & Ors [2018] 2 MLJ 693; [2017] 10 CLJ 385, FC (refd)

Kawin Industrial Sdn Bhd (in liquidation) v Tay Tiong Soong [2009] 1 MLJ 723, HC (refd)

LMW Electronics Pte Ltd v Ang Chuang Juay & Ors [2010] 1 MLJ 185, HC (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 304, 304(1)
Companies Act 2016 s 540, 540(1), (3), (4)
Interpretation Acts 1948 and 1967 s 3
Rules of Court 2012 O 18 r 19(1)(a), (1)(b), (1)(c), (1)(d)

Appeal from: *Johanjana Corporation Sdn Bhd v Zamzam Arabic Food Sdn Bhd (digulungkan) & Ors* [2021] MLJU 2469 (High Court, Shah Alam)

Ng Jun Wei (with Ooi Wai Chun) (Amrit & Co) for the appellant.
Yusrin Faiz Yusof (Faidz Leong & Chong) for the respondent.

Hadhariah Syed Ismail JCA:

INTRODUCTION

[1] The appeal by the appellants ('second defendant' and 'tenth defendant' respectively) is against the decision of the High Court dated 5 October 2020 dismissing the appellants' application to strike out the respondent's writ of summons and statement of claim.

[2] We heard and allowed the appeal on 4 January 2022. Our reasons for the decision are stated below.

[3] In this judgment, the parties will be referred to as they were in the High Court.

SALIENT FACT

[4] The first defendant's company is the tenant of the plaintiff with regard to seven premises at Oasis 9, Jalan Tengku Ampuan Zabedah G/9, Seksyen 9, 40100 Shah Alam. Tenancy agreements were executed and signed between the plaintiff and the first defendant in respect of the seven premises.

[5] At all material times, the first defendant's company operated all seven premises as an Arabic food restaurant and banquet hall known as 'Restoran ZamZam'.

[6] The first defendant's company defaulted the tenancy agreements by non-payment of rental and refusal to surrender vacant possession upon expiry of the said tenancies.

[7] Via Shah Alam Sessions Court Suit No B52 NCVC-21–02 of 2018 ('Suit 21'), the plaintiff sued the first defendant for breach of tenancy

agreements, arrears of rental, vacant possession and damages. A

[8] On 28 May 2018, the sessions court allowed the plaintiff's claim. The sessions court's decision was affirmed by the High Court.

[9] It is an undisputed fact that the second defendant and the tenth defendant were never a parties to the tenancy agreements. They were also not named as parties in Suit 21. B

[10] The first defendant vacated the plaintiff's premises on 20 July 2018 and moved its business operation to another premises. C

[11] The second defendant is the company which currently runs the business of 'Restoran Zamzam' at Seksyen 13, Shah Alam. The tenth defendant is the director and shareholder of the second defendant. D

[12] On 26 September 2018, the plaintiff discovered that during the active litigation between the parties, the first defendant's business operation and goodwill known as Restoran Zamzam was transferred to the second defendant wherein a new Arabic food restaurant under the same name was in active operation at No 46, Jin Renang 13/26, Seksyen 13, Tadisma Business Park, 40100 Shah Alam. E

[13] As the debt remained unpaid, the plaintiff filed a winding up petition against the first defendant vide Shah Alam High Court Winding Up Petition No BA-28 NCC-119–02 of 2019. The petition was allowed unopposed. The first defendant was wound up on 16 May 2019. F

[14] As a result of the first defendant's failure to satisfy the judgment sum obtained in Suit 21, the plaintiff filed Suit No BA-22 NCC-147–11 of 2019 at the Shah Alam High Court against the eleventh defendants. The plaintiff's claim against the defendants are for declarations that a fraud or fraudulent scheme under s 540 of the Companies Act 2016 was perpetrated against the plaintiff to evade the first defendant from payifng its debt to the plaintiff and that the defendants are personally liable to pay the debt and liability of the first defendant in the sum of RM1,872,966.49 as at 31 October 2019 and interest at the rate of 5%pa from the date of filing of the writ to satisfaction. G H

[15] The reliefs sought against the defendants are as follows: I

(a) a declaration that the second, third and fourth defendant have been used by the first defendant company to avoid its obligations and responsibilities and with intent to defraud the plaintiff wherein a fraudulent scheme was carried out so that the assets, business and

restaurant operations of the first defendant is transferred to the ZamZam Group of Companies which consisted of the second, third and fourth defendant in order to avoid paying the first defendant's debt to the plaintiff;

(b) a declaration that the fifth, sixth, seventh, eighth, ninth, tenth and 11th defendants as directors, officers and shareholders of the first, second, third and fourth defendants have with intent to defraud the plaintiff wherein a fraudulent scheme was carried out so that the assets, business and restaurant operations of the first defendant is transferred to the ZamZam Group of Companies which consists of the second, third and fourth defendants in order to avoid paying the first defendant's debt to the plaintiff;

(c) a declaration that the second to 11th defendants have colluded and conspired to carry out the business of the first defendant for a fraudulent purpose and shall be personally liable, without any limitation of liability, towards all debts and liability of the first defendant to the plaintiff; and

(d) an order that the second to 11th defendants jointly and severally be made liable to the first defendant's debt to the plaintiff in the sum of RM1,872,966.49, general damages and interest at 5%pa from the date of filing of the writ till satisfaction and costs.

[16] The plaintiff's case based on s 540 of the Companies Act 2016 is pleaded in para 28 of the statement of claim as follows:

28. Defendan pertama telah melalui pegawai-pegawai, pemegang saham dan syarikat-syarikat dalam Kumpulan Syarikat Zamzam tersebut telah menjalankan perniagaan dengan niat untuk memfraud plaintif mengikut Seksyen 540 Akta Syarikat 2016 untuk mengelak jumlah penghakiman yang harus dibayar oleh defendan pertama kepada plaintif. Memandangkan perniagaan dan operasi tunggal defendan pertama adalah perniagaan Restoran Zamzam tersebut, defendan pertama telah memindahkan asset, perniagaan dan operasi yang berkaitan dengan defendan pertama di mana Defendan kedua, ketiga, keempat, kelima, keenam, Ketujuh, Kelapan, Kesembilan, Kesepuluh dan Kesebelas adalah pada setiap mass berkenaan mempunyai pengetahuan akan keberhutangan defendan pertama tersebut dan penghakiman yang harus dibayar oleh defendan pertama kepada plaintif.

BUTIR-BUTIR DALAM MENGELAKKAN KEWAJIPAN DAN TANGGUNGJAWAB UNDANG-UNDANG DAN/ATAU MELAKUKAN SKIM PENIPUAN

a) Pada sekitar April 2014, defendan kelima telah memohon penukaran nama penyewa, memindah deposit sewa, deposit utility dan hutang sewa dan caj utiliti penyewa asal iaitu defendan ketiga sebanyak RM328,676.73 kepada defendan pertama dengan niat untuk tidak membayar keberhutangan tersebut;

b) Pada 24.4.2014, defendan kelima sebagai pengarah kedua-dua syarikat defendan pertama dan ketiga membuat persetujuan bahawa kedua-dua syarikat mengaku janji untuk menjelaskan hutang yang dipindahkan tersebut, akan tetapi telah mungkir untuk memenuhi akujanji tersebut;

c) Defendan pertama dengan sengaja enggan membayar sewa dan utiliti terkumpul bagi promis tersebut semenjak 1.8.2017 dengan niat untuk tidak membayar jumlah tertunda dari tarikh tersebut bersama sama sewa dua kali ganda sehingga premis-premis tersebut dikosongkan pada 20.7.2018;

d) Defendan pertama telah menduduki premis-premis plaintif tersebut tanpa kebenaran dari 25.11.2017 sehingga 20.7.2018;

e) Defendan pertama telah beroperasi di premis-premis plaintif tersebut secara tidak sah dan tanpa lesen promis dan lesen restoran dari 1.1.2018 hingga 20.7.2018 demi untuk mendapat hasil operasi restoran tanpa niat untuk membayar sewa;

f) Defendan pertama mendirikan binaan tidak sah dan halangan di atas kawasan gunasama promis tersebut dan juga melakukan pelbagai kesalahan sehingga dikenakan dengan 17 saman oleh Majlis Perbandaran Shah Alam;

g) Defendan kelima dan keenam sebagai pengarah defendan pertama dengan sengaja tidak memfailkan akaun dan lapuran tahunan bagi defendan pertama semenjak Januari 2017;

h) Defendan kelima dan keenam sebagai pengarah defendan pertama dengan sengaja tidak menzahirkan alamat perniagaan defendan pertama dalam pendaftaran dengan Suruhanjaya Syarikat Malaysia (SSM) bagi menyukarkan perlaksanaan penghakiman;

i) Defendan kelima dan keenam sebagai pengarah defendan pertama dengan sengaja memindahkan alamat berdaftar defendan pertama dengan SSM dari No. 32-4-2, Jalan Semarak Api 3, Diamond Square, Off Jalan Gombak 53000 Kuala Lumpur, ke sebuah gudang kosong yang beralamat di Lot 24, Jalan Modal 23/2, Seksyen 23, 40300 Shah Alam, Selangor untuk menyukarkan penyerahan kertas kausa dan mengelakkan perlaksanaan penghakiman;

j) Dengan niat untuk menghindari liabiliti dari tindakan undang-undang, sekitar Julai 2018, defendan kelima dan keenam sebagai pengarah defendan pertama telah memindahkan dan/atau meiupuskan asset defendan pertama tanpa mengakaunkan pendapatan/keuntungan dari pemindahan atau pelupusan yang dilakukan;

k) Defendan kelima dan keenam sebagai pengarah defendan pertama telah memindahkan asset, tenaga kerja, perniagaan dan operasi restoran milik defendan pertama iaitu 'Restoran Zamzam' dari Oasis 9; Jalan Tengku Ampuan Zabedah G 9/G, seksyen 9, Shah Alam, Selangor kepada defendan kedua yang menjalankan perniagaan restoran yang sama

(Restoran Zamzam) di alamat No. 46, Jalan Renang 13/26, Seksyen 13, Tadisma Business Park, 40100 Shah Alam, Selangor;

l) Defendan kelima dan keenam sebagai pengarah defendan pertama telah membiarkan defendan pertama digulungkan pada 16.5.2019 akibat kegagalan untuk membayar hutang kepada plaintif;

m) Defendan kelima dan keenam sebagai pengarah defendan pertama telah menyembunyikan keuntungan perniagaan semasa operasi tidak sah di mana asset-aset telah dibawa keluar ke promis restoran baru yang dikendalikan dan di bahagi-bahagi antara defendan kedua, ketiga dan keempat supaya tidak dapat dikesan dan ditadbir oleh Pegawai Penerima iaitu pelikuidasi yang dilantik Mahkamah;

n) Pemegang saham-pemegang saham dan/atau pengarah-pengarah defendan pertama, iaitu defendan kelima, keenam, ketujuh, kelapan dan kesembilan yang mempunyai pengetahuan penuh berkenaan jumlah penghakiman yang harus dibayar kepada plaintif secara fraud telah bersetuju untuk memindah segala asset, tenaga kerja, perniagaan dan operasi restoran milik defendan pertama iaitu 'Restoran Zamzam' kepada defendan kedua, ketiga dan keempat;

o) Pemegang saham-pemegang saham dan/atau pengarah-pengarah defendan kedua iaitu defendan kelima, kelapan dan kesepuluh yang mempunyai pengetahuan penuh tentang niat secara fraud telah bersetuju untuk menerima perpindahan segala asset, tenaga kerja, perniagaan dan operasi restoran milik defendan pertama iaitu 'Restoran Zamzam' dari defendan pertama;

p) Pemegang saham-pemegang saham dan/atau pengarah-pengarah ketiga iaitu defendaan kelima dan kesebelas yang mempunyai pengetahuan penuh tentang niat secara fraud telah bersetuju untuk menerimaa perpindahan asset, tenaga kerja, perniagaan dan operasi restoran milik defendan pertama iaitu 'Restoran Zamzam' dari defendan pertama; dan

q) Pemegang saham-pemegang saham dan/atau pengarah-pengarah defendan keempat iaitu defendan kelima dan kesepuluh yang mempunyai pengetahuan penuh tentang niat secara fraud telah bersetuju untuk menerima perpindahan asset, tenaga kerja, perniagaan dan operasi restoran milik defendan pertama iaitu 'Restoran Zamzam' dari defendan pertama.

[17] On 15 January 2020, the plaintiff withdrew the action against the 11th defendant as she had passed away.

[18] Interlocutory judgment has been obtained against the third, fourth and seventh defendants on 16 January 2020.

[19] On 26 December 2019, the second defendant and the tenth defendant filed an application (encl 16) to strike out the plaintiffs writ of summons and

statement of claim dated 5 November 2019 pursuant to O 18 r 19(1)(a) and/or (b) and/or (c) and/or (d) of the Rules of Court 2012 of the Rules of Court 2012 on the ground that it did not disclose a reasonable cause of action and was an abuse of court process.

[20] The second defendant's striking out is premised on the following four grounds:

(a) s 540 of the Companies Act 2016 only involves an individual and not a company;

(b) the second defendant as a company does not fall within the definition of any person in s 540(1) of the Companies Act 2016;

(c) plaintiff had no cause of action against the second defendant;

(d) the first defendant's failure to pay its debt to the plaintiff has nothing to do with the second defendant who is not a party to the tenancy agreements between the plaintiff and the first defendant; and

(e) on the face of the pleadings, the plaintiff's claim against the second defendant is obviously unsustainable.

[21] The tenth defendant's striking out application is premised on the following grounds:

(a) as the plaintiff had no cause of action against the second defendant, the tenth defendant as the director of the second defendant should not be made a party to this action;

(b) the second defendant was incorporated in 2015 and carry on a restaurant business simultaneously with the first defendant at the material time; and

(c) the plaintiff cannot proved that the tenth defendant had committed any fraudulent transaction as alleged by the plaintiff.

DECISION OF THE HIGH COURT

[22] On 5 October 2020, the learned judicial commissioner ('JC') dismissed the second defendant and tenth defendant's application based on the following findings of fact:

(a) the plaintiffs claim is not obviously unsustainable as sufficient particulars of fraud or fraudulent trading involving the second defendant and the tenth defendant have been pleaded in para 28(a)–(q) of the statement of claim;

(b) the word 'person' in s 540(1) of the Companies Act 2016 includes a a corporation based on the definition of the word 'person' in s 3 of the

A Interpretation Acts 1948 and 1967; and

(c) s 540(1) read together with s 540(3) and (4) of the Companies Act 2016 enabled any company or an individual who was involved in the activity or in receipt of proceeds of fraudulent trading to be named as a defendant.

B THE ISSUES

[23] The three main issues raised in this appeal are as follows:

(a) whether the second defendant company is 'a person' under s 540(1) of the C Companies Act 2016;

(b) whether the tenth defendant can be sued despite not being a director of the first defendant; and

(c) whether the plaintiffs claim against the second defendant and the tenth D defendant was plainly unsustainable.

The first issue

[24] Section 540 of the Companies Act 2016 provides as follows:

E

540 Responsibility for fraudulent trading

(1) If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intend to defraud the reditors of the company or creditors F of any other person or for any fraudulent purpose, the Court on the application of the liquidator or any creditor or contributory of the company, may, if the Court thinks proper so to do, declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court G direct

(2) Where a person has been convicted of an offence under subsection 539(3) in relation to the contracting of such a debt as is referred to in that section, the Court on the application of the liquidator or any creditor or contributory of the company may, if the Court thinks proper so to do, H declare that the person shall be personally responsible without any limitation of liability for the payment of the whole or any part of that debt

(3) When the Court makes any declaration under subsection (1) or (2), the Court may give such further directions as it thinks proper for the purpose of giving effect to that declaration, and in particular may make provision I for making the liability of any person under the declaration a charge on any debt or obligation due from the company to the p erson, or on any charge or any interest in any charge on any assets of the company held by or vested in the person or any corporation or person on his behalf, or any person claiming as assignee from or through the person liable or any

corporation or person acting on his behalf, and may from time to time make such further order as is necessaty for the purpose of enforcing any charge imposed under this subsection.

(4) For the purposes of subsection (3), 'assignee' includes any person to whom or in whose favour by the directions of the person liable for the debt, obligation or charge was created, issued or transferred or the interest created, but does not include an assignee for valuable consideration and consideration by way of marriage, given in good faith and without notice of any of the matters on the ground of which the declaration is made.

(5) Where any business of a company is carried on with the intent or for the purpose mentioned in subsection (1), every person who was knowingly a party to the carrying on of the business with that intent or purpose, commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding ten years or to a fine not exceeding one million ringgit or to both.

(6) This section shall have effect notwithstanding that the person concerned is criminally liable under this Act in respect of the matters on the ground of which the declaration is made.

(7) On the hearing of an application under subsection (1) or (2), the liquidator may give evidence or call witnesses himself.

[25] Learned counsel for the second defendant submitted that s 540(1) only applies to a person, ie, director and/or shareholder of the company who carried out the business of the company with intent to defraud a creditor. It was submitted that a plain reading of s 540(1) clearly shows that any offence or wrong doing is intended against an individual person and not against a corporation or a company. It is submitted that the second defendant, as a company, does not have a mind and/or knowledge of its own to carry on its business with intent to defraud a creditor. It was submitted that the plaintiff is attempting to strain the statute to implicate the second defendant and this amounts to an abuse of court process.

[26] As the word 'person' is not defined in the Companies Act, learned counsel for the plaintiff relies on s 3 of the Interpretation Acts 1948 and 1967 which defines the word 'person' to include a body of persons, corporate or unincorporate. Reading s 540(1) together with s 3 of the Interpretation Acts, learned counsel for the plaintiff contended that s 540(1) applies to a real person and a company. The learned JC accepted the plaintiffs contention.

[27] We agree with the submission of the learned counsel for the second defendant. We take the view that s 3 of the Interpretation Acts could not be read into s 540(1) of the Companies Act as it would give effect to inconsistent meanings to s 540(1). The underlying purpose of s 540(1) is to impose a personal responsibility and liability on the director and/or the person who

controls the company and not the company itself for carrying on the business of the company with intent to defraud a creditor. The wording in s 540(1) is plain and unambiguous. The word 'person' in s 540(1) in its ordinary and natural meaning meant ' a real person'. He could be a director, managing director or person in control of the company. Therefore, to give effect to s 540(1), the court must apply the ordinary meaning of 'person' and not the meaning assigned to it by the plaintiff.

[28] To accede to the plaintiff's contention would render s 540(1) meaningless because s 540(1) had a penal consequences. Only a real person could have an intention to defraud a creditor. Such an intention does not exist in a company. For example, the act of purchasing goods with knowledge or intention of not paying for the goods because the company had no funds can only be made by a director of the company who carries on the business in that manner because a company does not have a mind to cheat: see *Kawin Industrial Sdn Bhd (in liquidation) v Tay Tiong Soong* [2009] 1 MLJ 723; *LMW Electronics Pte Ltd v Ang Chuang Juay & Ors* [2010] 1 MLJ 185.

[29] In *Dato' Prem Krishna Sahgal v Muniandy a/l Nadasan & Ors* [2018] 2 MLJ 693; [2017] 10 CLJ 385, the appellant, who was the managing director of a company was found personally liable by the High Court and the Court of Appeal to pay arrears of salary and workers' compensation amounting to RM2,910,201.78 for carrying on the business of the company with intent to defraud the employees pursuant to s 304 of the Companies Act 1965. On appeal to the Federal Court, on the question of law: whether an employee who makes a claim of statutory emoluments and contribution was entitled to make a claim as a creditor for the purpose of s 304(1) of the Act, under (held 1), the Federal Court said:

> (1) Section 304 of the Act deals with fraudulent trading or carrying on a business with an intention to defraud creditors. A person will not be able to hide behind the corporate veil and avoid liability for the company's debts if he had used the company to perpetrate fraud and the company went into liquidation. The section provides for liability against directors personally on the basis that they carried on business of the company with the intention of defrauding creditors ...

[30] In *Chin Chee Keong v Toling Corp (M) Sdn Bhd* [2016] 3 MLJ 479, the Court of Appeal said: 'The primary object behind sub-s 304(1) of the Companies Act 1965 is to statutorily provide for the lifting of the veil of incorporation in the specific circumstances of fraudulent trading with a view to ultimately pinning personal accountability and liability on the directing minds behind such trading of company. Subsection 304(1) affords the creditor of the company a civil remedy personally against such persons'.

[31] We, therefore, find that the learned JC had erred in law in accepting the

plaintiff's contention that the word 'person' in s 540(1) of the Companies Act include a company. For this reason, we find there is merit in the first issue raised by the second defendant. We hold that the word 'person' in s 540(1) of the Companies Act 2016 does not includes a company. It therefore follows that the plaintiff did not have a cause of action against the second defendant, which is a company.

The second issue

[32] In this case, the first defendant was a company who had allegedly carried on its restaurant business with intent to defraud the plaintiff. The tenth defendant is not a director of the first defendant. The tenth defendant is a director of the second defendant. The tenth defendant had no involvement at all in the business of the first defendant. This being the case, it is our considered view that s 540(1) is not applicable to an individual who is not a director in a company that carries on business with intend to defraud a creditor. For this reason, we find the learned JC had erred in holding s 540(3) of the Companies Act enabled any person who is not a director in the company used to trade fraudulently to be named as a party in s 540 Suit. In our opinion s 540(3) is not applicable simply because that section applies only after the court finds the elements in s 540(1) have been satisfied which is not the case here. Accordingly, we hold that the plaintiff had no cause of action against the tenth defendant and he should not be named as a party in this action.

The third issue

[33] Consequent to our findings that the plaintiff had no cause of action against the second and tenth defendants, it must, therefore, follow that the plaintiff's claim against the second and tenth defendants are plainly unsustainable and must fail. In this regard, we find that the learned JC had erred in his finding that sufficient particulars of fraudulent trading were pleaded against the second and tenth defendant. To the contrary, we find there were no particulars of the second and tenth defendant's involvement in the first defendant's business which purportedly had been carried on with intent to defraud the plaintiff. We find that para 28(k) and (o) of the statement of claim are insufficient to bring a case under s 540(1) against the second defendant and the tenth defendant.

OUR DECISION

[34] For the aforesaid reasons, we allow the appeal and set aside the order of the High Court. The plaintiffs claim against the second defendant and the tenth defendant is hereby struck out.

Appeal allowed, decision of the High Court set aside; and respondent's writ and statement of claim against the appellants struck out.

Reported by Ashok Kumar